88-1676

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EXPRESS COURIER, INC.,

Petitioner,

v.

NEW YORK STATE DEPARTMENT OF LABOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

1. Where an administrative agency is charged with enforcing the laws as to an industry, and where a firm seeks judicial review of agency actions, alleging that the agency (1) has established no industry-wide rules, (2) has never set forth standards for compliance, (3) has made determinations in almost identical cases with opposite results, (4) has refused to formulate rules, and (5) that absent uniform application of standards throughout the industry, the agency action as to petitioner would destroy its ability to compete, does the petition for judicial review set out a cause of action for arbitrary and capricious conduct by the agency in violation of petitioner's rights to procedural due process under the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Where a legislature designs a hearing process to determine whether persons are "employees" entitled to unemployment benefits and charges an administrative agency with making that determination, and where the agency uses the hearing process alone, without recourse to rule-making or other compliance procedures within its power, to compel employers to pay unemployment insurance benefits both to individuals subject to individual determinations and all other employers of that one firm, and where this method results in only random compliance in the industry, is the rule-making by adjudication alone "void-for vagueness," and can courts compel the agency to use a process which is rational and systematic and gives fair notice throughout the industry as to whether unemployment insurance coverage is required?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption of this Petition, A Lightspeed Messenger Service, Inc., a New York Corporation, was a party to the proceedings in each of the courts below, as Petitioner-Intervenor.

STATEMENT AS TO AFFILIATED COMPANIES

Petitioner Express Courier, Inc. has no parent companies, subsidiaries, or affiliates.

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IN THE

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OCTOBER TERM, 1988

EXPRESS COURIER, INC.,

Petitioner,

v.

NEW YORK STATE DEPARTMENT OF LABOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

OPINIONS BELOW

The Order of the Court of Appeals of New York denying Petitioner's motion for leave to appeal, without opinion, is reported at 73 N.Y. 2d 703, 537 N.Y.S.2d 491 (1989).

The Order of the Court of Appeals of New York dismissing Petitioner's appeal to that court, without opinion, is reported at 72 N.Y. 2d 951, 533 N.Y.S.2d 58 (1988).

The Order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, dated May

26, 1988, denying Petitioner's motion for reargument or for leave to appeal to the Court of Appeals, without opinion, was not reported, but is reproduced in the Appendix.

The Order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, affirming the trial court, without opinion, is reported at 138 A.D. 2d 982, 525 N.Y.S. 2d 748 (1988).

The opinion and order of the Supreme Court of the State of New York (Hon. Martin Evans, J.), was not reported. The opinion and order of the trial court and each of the orders of the New York appellate courts, are reproduced in the Appendix to this Petition.

JURISDICTION

The Order of the Court of Appeals of the State of New York denying Petitioner's motion for leave to appeal was dated and entered January 12, 1989.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States

Fourteenth Amendment to the Constitution of the United States

New York Labor Law, § 511
(General definition of Employment)

1. General definition. "Employment" means (a) any service under any contract of employment for hire, express or implied, written, or oral

New York Labor Law, § 530 (1)
(General Powers of Industrial Commissioner)

The commissioner shall administer this article and for such purpose he shall have power to make all rules and regulations and, subject to the regulations of the civil service, to appoint such officers and employees as may be necessary in the administration of this article.

New York Labor Law, § 535 (Referees)

The commissioner shall appoint, subject to the regulations of the civil service, as many persons as may be necessary to be referees to perform the duties prescribed by this article. It shall be the duty of a referee, under the supervision, direction and administrative control of the appeal board, to hear and decide disputes in accordance with the provisions of this article and to conduct such other and further hearings in connection with the foregoing as may be required by the board.

STATEMENT OF THE CASE

The facts are stated in the Amended Verified Petition brought by Petitioner in the Supreme Court of the State of New York. A copy of the Petition is reproduced in the Appendix. On a motion by Respondent, the trial court dismissed the Petition. For the purposes of a motion to dismiss under New York law, each and every allegation of fact in the Petition is assumed to be true. *219 Broadway v. Alexander's*, 46 N.Y. 2d 506, 387 N.E.2d 1205, 414 N.Y.S.2d 889 (1979).

Petitioner is a messenger service business in the City of New York. The practice in the messenger service industry is to treat bicycle messengers as "independent contractors."

Respondent is the state administrative agency charged with the responsibility for determining the employment status of

persons engaged by services such as Petitioner with respect to unemployment insurance. Respondent has both rule-making and adjudicatory powers. Respondent has failed and refused to promulgate a rule setting an industrywide standard requiring treatment of bicycle messengers as either "employees" or "independent contractors." Rather, Respondent relies on case-by-case adjudication to determine whether a given person has been engaged as an "employee" or "independent contractor." Based upon an adjudication that a single person engaged by a firm is an "employee," Respondent requires retroactive payment of unemployment insurance contributions, interest and penalties not only for the claimant, but also for all persons similarly engaged by the same firm. The adjudication as to a single employee of one firm does not bind any other firms in the same industry to treat its similarly situated employees in the same manner.

Respondent determined that a single messenger engaged by Petitioner was an "employee," and based upon this adjudication, demanded retroactive payment of unemployment insurance contributions for all persons who had performed services for Petitioner under circumstances similar to those of the one messenger whose claim was adjudicated. Respondent refused Petitioner's requests (1) to limit the effect of the adjudication to the one employee, (2) to allow Petitioner to implead or act as class representative for all firms in its industry in New York, NY, or (3) for Respondent to promulgate an industrywide rule classifying bicycle messengers as "employees."

For Petitioner to begin treating its messengers as "employees" while competing firms in its industry remained free to continue to treat their messengers as "independent contractors" would destroy its ability to compete.

Petitioner challenged the arbitrary application and discriminatory result of Respondent's policy of enforcing the labor law only through case-by-case adjudications applied companywide but not industrywide, and of refusing to promulgate industrywide rules or standards. Petitioner raised the federal question presented herein under the Due Process Clause of the Fifth and Fourteenth Amendment. The Administrative Law

Judge ruled that he had no jurisdiction to decide the Constitutional issues raised by Petitioner.

Petitioner initiated this proceeding for judicial review of the administrative agency process as an unconstitutional denial of due process and equal protection. The Amended Verified Petition itself raised the federal question presented herein under the Due Process Clause. The trial court granted Respondent's motion to dismiss the Petition, apparently holding that Respondent's use of a case-by-case procedure alone did not violate due process or equal protection.

The federal question under the Due Process Clause was again raised by Petitioner in its Reply Brief to the Appellate Division of the New York Supreme Court.[1] The Appellate Division affirmed the dismissal of the Petition without opinion. The federal question under the Due Process Clause was again raised by Petitioner in its motion to the Appellate Division of the New York Supreme Court for reargument or for leave to appeal to the Court of Appeals. The Appellate Division denied both branches of Petitioner's motion, without opinion.

The federal question under the Due Process Clause was again raised by Petitioner in its Notice of Appeal and Jurisdictional Statement to the Court of Appeals of the State of New York. The Court of Appeals dismissed Petitioner's appeal for want of jurisdiction, without opinion. The federal question under the Due Process Clause was again raised by Petitioner in its motion to the Court of Appeals for leave to appeal. The Court of Appeals denied the motion for leave to appeal without opinion.

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[1] This brief further raised the question of whether regulations were needed to avoid a "void-for-vagueness" problem caused by the lack of notice to employers as to what conduct was required. Petitioner would have raised this issue again had it been permitted to brief its position in the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. THE QUESTIONS PRESENTED CONCERN THE TOTAL DISREGARD BY THE NEW YORK COURTS OF PRINCIPLES OF DUE PROCESS STATED BY THIS COURT

In *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed. 2d 270 (1974), this Court stated:

> The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.

The Court struck down a decision made by an agency under its administrative interpretations, holding that it should have promulgated and published full legislative-type rules. In contrast, Respondent NYS Department of Labor has refused to promulgate even an administrative interpretation rule or any sort of industrywide standard, but relies *entirely* on *ad hoc* adjudications to make law as to employer liability for unemployment insurance coverage, both retroactively and prospectively.

While this Court did not reach constitutional issues because its holding could be based on statutory grounds, 415 U.S. at 238, 94 S.Ct. at 1076, the principles come within this Court's long tradition of supporting a norm of regularity in governmental conduct, see, *e.g.*, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954), *Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42, 103 S.Ct. 2856, 2866, 77 L.Ed. 2d 443 (1983); *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808, 93 S.Ct. 2367, 2374-2375, 37 L.Ed. 2d 350 (1973), which norm can be applied to the States under the Due Process Clause of the Fourteenth Amendment, *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed. 2d 552 (1980).

The procedures employed by Respondent and their acceptance by the New York Courts are in particular disregard of principles enunciated by this Court in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed. 2d 709 (1969). The position of six Justices in *Wyman-Gordon* was that a rule announced in an adjudicatory opinion but not applied in the particular case was invalid, as rule-making procedures should have been used to promulgate the rule. The procedures employed by Respondent NYS Department of Labor are similarly flawed, as an adjudication as to one messenger is used to announce a rule applicable retroactively to all messengers at that firm, while leaving competing firms free to continue to follow industry practice of treating their messengers as independent contractors.

The statutory standard set by Labor Law § 511 is exceedingly broad, and cries out for a regulation defining its application. As this Court observed in *Dixon v. Love*, 431 U.S. 105, 115, 97 S.Ct. 1723, 1729, 52 L.Ed.2d 172, 181 (1977), it would be at least "commendable" if Respondent "sought to define the statutory standard narrowly by the use of his rulemaking authority." Respondent has failed and refused to use its rulemaking authority, and the New York Courts have declined to review that refusal.

The New York Courts further ignored the insistence by this Court that "the laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed. 2d 222, 227 (1972). It appears that Respondent's rule-making by adjudication alone fails to give notice that bicycle messengers must be treated as "employees," as the practice of New York's messenger service industry is to treat bicycle messengers as "independent contractors."[2] As a result of the randomness of Respondent's enforcement process, Petitioner has in effect been singled out for different treatment. "Where, as here, there are no standards governing the exercise

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[2] See *Diebold, Inc. v. Marshall*, 585 F. 2d 1327 (6th Cir. 1978), where the Court concluded that the average employer has been unaware of what the OSHA regulations at issue required "unless we embrace the untenable assumption that industry has been habitually disregarding a known legal requirement."

of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170, 92 S.Ct. 839, 847, 31 L.Ed.2d 110, 120 (1972).

The refusal of both New York appellate courts to give any review to Petitioner's allegations of due process violations in Respondent's procedures and the invalidity, for vagueness, of its rule-making by adjudication, ignores the norms stated by this Court in *Ruiz*, *Wyman-Gordon* and *Papachristou*. As under New York law the facts stated in the Petition must be accepted as true on a motion to dismiss, the dismissal cannot be upheld unless the facts alleged do not fit within any cognizable legal theory. *Rovello v. Orofino Realty*, 40 N.Y. 2d 633, 357 N.E.2d 970, 389 N.Y.S. 2d 314 (1976); *Morone v. Morone*, 50 N.Y. 2d 581, 407 N.E.2d 438, 429 N.Y.S. 2d 592 (1980). Respondent and the reviewing New York Courts simply failed to take cognizance of the issues raised under the Due Process Clause and decisions of this Court.[3]

II. THE QUESTIONS PRESENTED CONCERN THE TOTAL DISREGARD BY THE NEW YORK COURTS OF PRINCIPLES OF DUE PROCESS STATED BY THE FEDERAL COURTS OF APPEALS

The federal courts of appeals have further developed the doctrine requiring administrative agencies to employ rule-making rather than merely adjudication to announce law. As stated by the District of Columbia Circuit:

> Judicial review must operate to ensure that the administrative process itself will confine and control the

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[3] Petitioner of course does not contend that the principles governing this appeal have been settled by this Court. Compare *Ruiz* and *Wyman-Gordon* with *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed. 2d 134 (1974) and *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575 (1947). The New York Courts have plainly erred in failing to even recognize and consider the serious issues presented. This case provides an opportunity for this Court to refine its standard and provide greater guidance to the state courts and the federal courts of appeals.

> exercise of discretion. Courts should require administrative agencies to articulate the standards and principles that govern their discretionary decisions in as much detail as possible.

Environmental Defense Fund v. Ruckelshaus, 439 F. 2d 584, 598 (1971).

Some circuit court decisions explicitly condemn as a violation of procedural due process the failure of an administrative agency to promulgate written standards. *Holmes v. NYC Housing Authority*, 398 F. 2d 262, 265 (2d Cir. 1968); *White v. Roughton*, 530 F. 2d 750 (7th Cir. 1976); *Franklin v. Shields*, 569 F. 2d 784 (4th Cir. 1977 & 1978), cert. denied 435 U.S. 1003, 98 S.Ct. 1659, 56 L.Ed. 2d 92 (1978).[4] Others note the application of the void-for-vagueness doctrine to require rule-making. *Jean v. Nelson*, 711 F. 2d 1455, 1502 (11th Cir. 1983), affirmed 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed. 2d 664 (1985) ("The obvious solution, frequently recommended to avoid the dangers of discriminatory enforcement, would have been a specific policy adopted pursuant to notice and comment rulemaking."); *Soglin v. Kauffman*, 418 F. 2d 163, 167 (7th Cir. 1969).

The First Circuit provided this statement of the need for published regulations to govern labor certifications of aliens:

> [M]uch of the confusion in this area could be avoided were the Secretary to promulgate suitable regulations . . . rather than to formulate general policy case-by-case. . . . [I]n an area where the Secretary has considerable power under general statutory standards and must decide numerous cases in a routine fashion, the clarification of policy through rules or published pronouncements would protect against arbitrary action.

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[4] For district court decisions finding a denial of due process in the lack of written standards, see, *e.g.*, *Harnett v. Board of Zoning*, 350 F. Supp. 1159, 1161 (D.V.I. 1972); *Baker-Chaput v. Cammett*, 406 F. Supp. 1134, 1139-1140 (D.N.H. 1976); *City of Santa Clara v. Kleppe*, 418 F. Supp. 1243, 1261-1262 (N.D. Cal. 1976), reversed on other grounds 572 F. 2d 660 (9th Cir.), cert. denied 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978).

Silva v. Secretary of Labor, 518 F. 2d 301, 311 (1975). *Accord*, *Industrial Holographics v. Donovan*, 722 F. 2d 1362, 1366-1367 (7th Cir. 1983) ("The breadth of the statutory language and the volume of decisions virtually require the Secretary to develop systematic standards and procedures for deciding upon labor certification applications.")

Much confusion also reigns as to the application of NY Labor Law § 511 to bicycle messengers, and in the absence of any published standards, Petitioner has been the victim of especially arbitrary action. Respondent's finding of liability for unemployment insurance contributions, interest and penalties, retroactively as well as prospectively, applied companywide against Respondent but not industrywide against its competitors, without written standards, cannot be excused. The New York Courts have failed to even recognize the serious questions presented by the Petition and numerous decisions of the federal courts of appeals.[5]

III. THE QUESTIONS PRESENTED AFFORD THIS COURT AN OPPORTUNITY TO CLARIFY THE CIRCUMSTANCES IN WHICH ADMINISTRATIVE AGENCIES ARE REQUIRED UNDER THE DUE PROCESS CLAUSE TO PROMULGATE RULES

The retroactive, companywide but not industrywide, rulemaking by adjudication, employed by Respondent, will destroy Petitioner's ability to compete within its industry. The arbitrary and capricious process employed by Respondent demands redress under the principles of procedural due process and void-for-vagueness. Consideration of the questions presented under a writ of certiorari would afford this Court an ideal opportunity to clarify the circumstances in which administrative agencies should be required to promulgate rules or other ascertainable written standards.

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[5] While decisions of the courts of appeals are more numerous, they too take contrary positions on whether rule-making may be required. See, *e.g.*, *Patchogue Nursing Center v. Bowen*, 797 F. 2d 1137, 1143 (2nd Cir. 1986). This case provides an opportunity for this court to provide greater guidance to the courts of appeals as to when administrative rule-making may be required.

The United States Court of Appeals for the District of Columbia proclaimed in 1971 that "[w]e stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts." *Ruckelshaus*, 439 F. 2d at 597. This Court decided *Morton v. Ruiz* three years later, but has had little opportunity to elaborate on these landmark holdings and guide the development of doctrine by the courts of appeals. A leading scholar of administrative law has observed that both due process and void for vagueness are "solid legal theories . . . available to support a judicial requirement of rulemaking to guide discretionary action." 2 K. Davis, *Administrative Law Treatise* § 7:26 at 131 (2d ed. 1979). The questions presented, so obviously ignored by the New York Courts, provide an opportunity to examine whether these doctrines may in the compelling circumstances presented require a state administrative agency to formulate rules or other written ascertainable standards.

CONCLUSION

For all of the reasons contained herein, a writ of certiorari should be granted.

Dated: New York, N.Y.
April 10, 1989

Respectfully submitted,

LAWRENCE C. MOSS
Attorney for Petitioner

Of Counsel:
LEO KAYSER, III
RAGGIO, JAFFE & KAYSER

APPENDIX

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of January A.D. 1989

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

1-10 Mo. No. 1258

In the Matter of Express Courier, Inc.,

Appellant,

v.

New York State Department of Labor,

Respondent,

A Lightspeed Messenger Service, Inc.,

Intervenor.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twentieth day of September A.D. 1989

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

Mo. No. 1105 SSD 75

In the Matter of Express Courier, Inc.,

Appellant,

v.

New York State Department of Labor,

Respondent,

A Lightspeed Messenger Service, Inc.,

Intervenor.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

/s/Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 24, 1988.

Present—Hon. Francis T. Murphy, Presiding Justice,
David Ross,
John Carro,
Bentley Kassal,
Betty Weinberg Ellerin, Justices.

Application of Express Courier, Inc.,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the CPLR,

M-1654

—against—

[Appeal No. 32117]

New York State Department of Labor,

Respondent-Respondent,

A Lightspeed Messenger Service, Inc.,

Intervenor.

The above-named petitioner-appellant having moved for reargument of or leave to appeal to the Court of Appeals from the order of this Court entered on March 22, 1988,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion be and the same hereby is denied in its entirety, with $20 costs.

ENTER:

HAROLD J. REYNOLDS
Clerk.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 22, 1988.

Present—Hon. Francis T. Murphy, Presiding Justice,
David Ross,
John Carro,
Bentley Kassal,
Betty Weinberg Ellerin, Justices.

Application of Express Courier, Inc.,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the CPLR,

—against—

New York State Department of Labor, 32117

Respondent-Respondent,

A Lightspeed Messenger Service, Inc.,

Intervenor.

An appeal having been taken to this Court by the petitioner-appellant from a judgment of the Supreme Court, New York County (Martin Evans, J.), entered on July 7, 1987,

And said appeal having been argued by Leo Kayser of counsel for appellant, and by Frederick M. Paola of counsel for respondent; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same hereby is affirmed, without costs and without disbursements.

ENTER:

HAROLD J. REYNOLDS
Clerk.

SUPREME COURT OF THE STATE OF NEW YORK,
INDIVIDUAL ASSIGNMENT PART _____

at the Courthouse thereof, 60 Centre Street,
New York, New York, 10007.

Present: HON. MARTIN EVANS *Justice.*

Express Courier, Inc.,

– against –

New York State Dept. of Labor,

ORDER

Upon the foregoing papers this Motion to dismiss is granted. That respondent proceeds on a case by case basis is a procedure within its discretion; this Court cannot compel respondent to proceed against others. This is different from a "Ying Wo" injunction which must be based on discriminatory enforcement and which is not sought here. The cross motion with respect to Lightspeed Messenger Service is severed and adjourned to 5/26/87.

Dated May 5, 1978

Martin Evans J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

APPLICATION OF EXPRESS COURIER, INC.,

Petitioner,

For a judgment pursuant to Article 78 of the CPLR

– against –

NEW YORK STATE DEPARTMENT OF LABOR,

Respondent.

Index No. 22374/86

AMENDED VERIFIED PETITION

Petitioner, Express Courier, Inc., by its attorneys, Raggio, Jaffe & Kayser complaining of the respondent, alleges:

1. The petitioner, Express Courier, Inc., is a New York corporation engaged in the messenger service business in New York, City of New York.

2. Petitioner brings this action pursuant to Article 78 and §3001 of the CPLR seeking injunctive and declaratory judgment.

3. Respondent New York State Department of Labor is charged under the Labor Law §530 with the responsibility to determine the employment status of persons engaged by services such as plaintiff with respect to unemployment insurance and related conditions of employment.

4. Labor Law §511 defines the standards by which the status of "employee" is to be determined. There has been extensive litigation defining the standards to be applied to determine employment status in the messenger service industry. The Court

of Appeals has held in *The Matter of Charles A. Field Delivery Services, Inc.*, 66 N.Y.2d 516, 498 N.Y.S.2d 111 (1985), that a presumption exists that messengers are employees of messenger companies rather than independent contractors.

5. The industry practice in the messenger service business is to treat bicycle messengers as independant contractors.

6. Despite administrative rulings and court decisions, the respondent, the New York State Department of Labor ("the Labor Department"), has no industry-wide rule with regard to the proper designation of messengers as either employees or independant contractors. The Labor Department determines the appropriate classification as employees or independent contractors of the messengers of any given messenger service usually only upon the complaint of a messenger or former messenger of such a service. Any determination that the messengers are employees is retroactive and requires all taxes that would have been due in the past to be paid.

7. The respondent has brought compliance proceedings against other messenger services in attempts to have messengers classified as employees.

8. The standards offered by the respondent to differentiate between employees and independent contractors have never been explicitly set forth by the respondent and requests to the respondent by the industry for written guidelines have been refused.

9. In matters presently pending before the Courts, particularly in the Appellate Division 3rd Department, cases with almost identical facts involving the employment and contract relationships between messenger services and messengers have resulted in directly conflicting administrative and judicial results.

10. In the present circumstances, without written guidelines, there is no way for petitioner and others to conform to the unspecified requirements of the respondent and to differentiate between those messengers who are "employees" and those who are not.

11. On September 24, 1986, petitioner's counsel met with counsel for the Respondent Harris Levy. Petitioner's Counsel proposed that the Labor Department formulate rules to compel compliance with the Labor Law requirement as to unemployment compensation. Mr. Levy took the position that the Department had no such authority.

12. The Department of Labor has authority to promulgate and enforce rules which compel compliance with unemployment requirements outside of the review process of Labor Law §620.

13. In keeping with that "process", the Respondent is seeking to impose upon petitioner the requirement of treating its messengers as "employees":

A. On July 22, 1985, Mr. James Casey began working as an independent contractor bike messenger for petitioner. Prior to July 22, 1985, Mr. Casey worked for a few weeks as an employee of petitioner. Upon the termination of his relationship with petitioner, James Casey filed a claim for unemployment insurance with the Labor Department.

B. By letter dated March 21, 1986, the Labor Department notified petitioner of its determination that an employer/employee relationship existed between petitioner and Mr. Casey. The Department demanded that petitioner file supplemental reports and pay additional contributions arising from Mr. Casey's "employment". Additionally, the Labor Department ordered petitioner to file supplemental reports and pay contributions for all persons who had performed services for petitioner under circumstances similar to those surrounding Mr. Casey's relationship with petitioner.

C. By letter dated March 26, 1986, petitioner asked the Labor Department to re-evaluate its determination. Petitioner enclosed with the letter a signed statement by Mr. Casey stating that he expected unemployment benefits arising from the period that he was employed by petitioner. The statement set forth that Mr. Casey considered himself to be an independent contractor during the period in question. By letter dated April 21, 1986,

the Labor Department notified petitioner that its decision as to the status of Mr. Casey would not be changed.

D. By letter dated April 29, 1986, petitioner asked the Labor Department to limit the effect of its decision to Mr. Casey as an individual, rather than to enforce it on a company wide basis. Petitioner's letter noted the arbitrary application and discriminatory result of the Labor Department's policy, the absence of an industry wide regulation in the matter and the detrimental effect of the Labor Department's demand on petitioner's ability to remain competitive. By letter dated May 8, 1986, the Labor Department advised petitioner that the designation of Mr. Casey as an employee would not be changed.

E. By letter dated May 12, 1986, petitioner requested an appeal hearing. By notice dated July 7, 1986, the Labor Department advised petitioner that a hearing had been scheduled for July 17, 1986. Through its attorney, petitioner, by letter dated July 11, 1986, asked the Labor Department to allow petitioner to implead or to act as a class representative for all firms in its industry in New York, New York, and for an adjournment of the hearing. Without response to the substantive requests of petitioner, the Labor Department adjourned the hearing.

F. By letter dated August 12, 1986, petitioner through its attorney requested the Labor Department to promulgate an industrywide rule classifying messengers as employees.

G. Without formal response to petitioner's letter of August 12, 1986, the Department notified petitioner that a hearing to review its determination as to Mr. Casey's status had been scheduled for September 3, 1986, which hearing was adjourned *sine die* pending a meeting on September 24, 1986 with Labor Department officials on the legal issues raised by petition.

H. The hearing was rescheduled for September 29, 1986, but was suspended based upon the initiation of this action and the ruling of the Administrative Law Judge, without objection of this Labor Department, that he had no jurisdiction to decide the Constitutional issues raised herein.

14. The economic costs of petitioner's compliance with the Labor Department's ruling, absent its uniform application throughout the industry, would effectively destroy petitioner's ability to compete. While its competitors would remain free to engage the services of messengers on an independent contract basis, petitioner's operations would be encumbered by the labyrinth of regulations, paperwork and costs that would accompany the designation of its messengers as employees.

15. The process presently utilized by the Respondent is random, arbitrary and capricious. There exist other processes including rule making which could be utilized by the Respondent which would effect the same end without being random and without damaging any single member of the industry.

16. The aforesaid method by which the Labor Department would enforce the law against petitioner in *James Casey v. Express Courier, Inc.*, denies petitioner both Procedural Due Process and the Equal Protection of the law in violation of Constitutions of the State of New York and the United States.

WHEREFORE, petitioner demands that a judgment be entered against the respondent pursuant to CPLR §7801 and §3001: 1) declaring the present structure and process of enforcement of the unemployment laws to be arbitrary, capricious and unconstitutional, 2) declaring the procedures of the Department of Labor as applied in the matter of *James Casey v. Express Courier, Inc.*, to be unconstitutional in violation of the Due Process and Equal Protection Clauses of the United States and New York State Constitutions, 3) compelling the New York State Department of Labor to issue and enforce an industry-wide standard, requiring all messenger services to treat their messengers as employees, 4) and for such other and relief as may be appropriate.

Dated: New York, New York
October 8, 1986

Yours, etc.

RAGGIO, JAFFE & KAYSER
10 East 40th Street
New York, New York 10016
(212) 689-6850

VERIFICATION

State of New York)
: ss:
County of New York)

Anthony Pascone, being duly sworn, deposes and says:

Deponent is the President of the Petitioner, Express Courier, Inc., in the within action;

Deponent has read the foregoing amended Petition and knows the contents thereof; the same is true to deponent's own knowledge.

/s/Anthony Pascone
ANTHONY PASCONE

Sworn to before me this
14th day of October, 1986

/s/Bernard Wasserstein
Notary Public